Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

EMR NETWORK,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Does the Federal Communications Commission have an affirmative duty to develop evidence and to supplement the record in a proceeding before it to avoid "acting ignorantly when intelligent action is possible" — as expressed in the Second Circuit landmark decision in *Scenic Hudson*?

2. Does the Congressional mandate to the Federal Communications Commission to act "in a manner consistent with the public interest" in the deployment of broadband and other advanced wireless services require the FCC to determine the effect of its actions on the environment and human health? (47 U.S.C. § 157)

3. Does the exclusive regulatory authority assigned to the Federal Communications Commission to set human exposure guidelines for RF Radiation — pre-empting all State and Local Governments — obligate the FCC to regularly review and update those guidelines? (47 U.S.C. § 332(c)(7)(B)(iv))

4. Does the National Environmental Policy Act (NEPA) impose a "continuing responsibility" on the FCC to use all practicable means to assure safe and healthful surroundings for all Americans when carrying out its statutory functions? (42 U.S.C. § 4331 *et seq.*)

List of Parties and Corporate Disclosure Statement

Petitioner is EMR Network, part of a 501(c)(3) non-profit corporation based in Montpelier, Vt. The EMR Network's Mission Statement, published on its website is as follows:

EMR Network Mission Statement

> We believe that electromagnetic radiation (EMR), which includes the extremely low frequencies (ELF), the radio frequencies (RF) and microwave (MW) radiation, may be hazardous to life and may constitute a significant threat to public health. This belief is based on credible research, spanning decades of scientific inquiry. Our mission is to enhance local, regional, national, and international efforts to reduce, mitigate, and where possible, eliminate hazardous exposure to EMR.
>
> We are committed to fostering the appropriate scientific research. Our charge is to educate the public, government officials and those in other scientific disciplines about the biological effects and environmental concerns associated with EMR.
>
> The EMR Network was created to provide a forum for effective and balanced information for citizen-action groups, the media, municipal agents, government officials and scientists alike.
>
> www.emrnetwork.org

Respondents are the Federal Communications Commission and the United States of America.

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Citations of Official and Unofficial Reports of Opinions and Orders Entered in the Case

The Order of The Federal Communications Commission, released August 14, 2003, denying petitioner's Application for Review, is reported in the FCC's electronic files as FCC 03-191, and is reproduced in the Appendix at pages A-1 through A-13.

The opinion of the Court of Appeals for the District of Columbia denying petitioner's Petition for Review, decided December 7, 2004, is reported at 391 F.3d 269; 364 U.S.APP.D.C. 20; 34 Envtl.L.Rep.20,148; and 34 Communications Reg. (P&F) 713, and is reproduced in the Appendix at pages A-15 through A-21.

The Order of the Court of Appeals, filed on February 11, 2005, denying petitioner's Petition for Re-hearing en Banc is reproduced in the Appendix at page A-23.

Basis for Jurisdiction in Supreme Court

The Judgment of the Court of Appeals sought to be reviewed was entered on December 7, 2004. The Order denying petitioner's Petition for Rehearing en Banc was entered on February 11, 2005. This petition for certiorari is filed within 90 days thereof.

The statutory provisions believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question are 28 U.S.C. Sections 1254 (1) and 2101.

Certiorari is appropriate under Supreme Court Rule 10(a) because a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

Statutes Involved in the Case

National Environmental Policy Act (NEPA)

42 U.S.C. § 4321. **Congressional declaration of purpose**

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331. **Congressional declaration of national environmental policy**

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

2. assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332. **Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

the environmental impact of the proposed action,

any adverse environmental effects which cannot be avoided should the proposal be implemented,

alternatives to the proposed action,

the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; ***

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information

useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter 11 of this chapter.

Telecommunications Act of 1996

47 U.S.C. § 157.

(a) In general. — The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 332(c)(7)(B)(iv)

No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Statement of the Case

An agency of the United States Government is sponsoring a massive expansion of round-the-clock continuous exposure of the American people to radiation from wireless transmitters, in calculated and deliberate ignorance of the consequences and with reckless disregard of the known potential health effects — and making no distinction between the very young, the elderly, or the ailing among the universe of persons in the population.

The obvious common sense alternative to this know-nothing bureaucratic mindset is simple and inexpensive — to initiate independent, reliable scientific research into the biologic effects of 24/7 exposure to low-power ultra-high frequency wireless emissions on humans, domestic animals, plants and wildlife. So far, the agency has turned a deaf ear to all such suggestions, and the time has therefore come for this Court to remind the Commissioners and their staff of their legal responsibilities to the public.

Proceedings Below

EMR Network (EMR), a non-profit citizens organization concerned with the environmental effects of electromagnetic radiation, filed a petition with the Federal Communications Commission (FCC) dated September 25, 2001, requesting the Commission to inquire into the need for revising the FCC's RF Radiation Rules governing permissible levels of RF radiation from FCC-regulated transmitters. On December 11, 2001, the Acting Chief of the FCC's Office of Engineering & Technology (OET) issued a letter dismissing the EMR Petition for Inquiry pursuant to 47 CFR § 0.241. EMR then filed an Application for Review of the dismissal letter by the full Commission, pursuant to 47 CFR § 1.115, under date of January 10, 2002. On August 14, 2003, the Commission released its final Order upholding the dismissal of the EMR Petition. [FCC 03-191] (A-1 – A-13)

On October 3, 2003, EMR served and filed a timely Petition for Review of the FCC Order of August 14, 2003, by the Court of Appeals.

That court denied the Petition for Review on December 7, 2004. (A-15 – A-21) The petitioner then sought rehearing *en banc,* which was denied on February 11, 2005. (A-23)

Petitioner's standing is based on the fact that members of EMR Network are exposed to RF radiation and would benefit from the FCC's updating of its rules to provide them more protection. EMR was the original petitioner before the FCC and the Court of Appeals below.

The jurisdiction of the Court of Appeals was based on 28 U.S.C. §§ 2342-2344, 2349 and 47 U.S.C. § 402(a).

Factual Background

Over the past decade, the erection of mobile telecommunications transmitters across the U.S. has quite literally exploded as telecommunications companies have raced to control as much of the wireless market as possible. Transmitters have been installed on high-rise buildings and apartment houses in cities, in open fields, along interstate highways (sometimes disguised as trees), and even concealed in church steeples in small New England villages. Simultaneously, the growth in cell phone use by consumers has catapulted to a hundred and eighty million in the U.S. alone.

All of these wireless transmitters emit and receive radio frequency range signals that bombard and penetrate every living creature in their path, animal as well as human.

With the explosion in cell phone transmissions has come a rapid growth in other uses for RF range transmissions — digitized high speed internet access, digitized television broadcasts, email traffic and more. Often the cell transmitter

towers and installations are shared by other wireless companies, multiplying the volume and range of the RF signals radiating from each site.

All of this rapid technological change has been aided and encouraged by the Federal Communications Commission, whose declared mission under Congressional mandate is to "foster" rapid growth in telecommunications.

Currently, the FCC's strategic plan is to promote competition, innovation and investment in "broadband" services and facilities, described by the FCC as follows:

> Broadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution.
>
> [www.fcc.gov/broadband]

The problem is that *no public agency really knows what the environmental impact* of this blanket of RF radiation is on the people and animals in its path, especially the most vulnerable members of society — the elderly, infirm, small children, the unborn. The reason no one knows is that the one agency that has been given total pre-emptive control over this issue by the U.S. Congress is the FCC, which refuses to try to find out, as the FCC final Order in this case shows.

This is an "innocent bystander" case. EMR Network represents the interests of members of the general public who, as innocent bystanders, are continuously bombarded by ever-increasing amounts and higher and higher frequencies of wireless transmissions in workplaces, homes and schools, generating growing layers of RF radiation with the potential of long-term adverse human health effects that may not be discovered and diagnosed until long after it is too late to do anything to prevent them.

Numerous scientific studies around the world have identified biologic effects resulting from exposure to high frequency wireless radiation, many of them potentially harmful to human health. The researchers have repeatedly called for more comprehensive and reliable research — which the FCC itself is best able to initiate, presumably in cooperation with the Environmental Protection Agency (EPA). Yet these studies are uniformly rejected by the Federal Communications Commission as "inconclusive" and the EPA's expertise has been sidelined.

Many scientific studies into biologic effects of low-power ultra-high frequency transmissions have been conducted by academic researchers hampered by limited resources. The growing chorus from these researchers calling for more thorough studies cannot responsibly be ignored by the one agency with Congressionally-mandated *sole responsibility* for setting wireless RF radiation safety standards and with the ability to request help from other agencies and to seek Congressional funding to conduct that research. (See 47 U.S.C. § 332(c)(7)(B)(iv).) That agency is the FCC. However, the FCG has repeatedly stonewalled these calls for research by responsible scientists not only in the U.S. but also in places like the U.K., Sweden, The Netherlands, Spain, Italy, Austria and other nations around the globe. It has done so in this very proceeding.

This Court can take judicial notice as legislative facts of the steady flow of relevant scientific studies that have been published even during the time this case has been pending. [A complete list of major RF radiation studies published since October 2003 will be found at: http://www.emrpolicy.org/science/research/docs/2003_2005_research.pdf]

Possibly the most dramatic of these published studies is a July 2004 report from Sweden, indicating that RF radiation produced by frequency-modulated FM radio transmissions

has increased the *incidence and mortality of skin cancers (i.e., melanomas)* in human populations in Sweden, France and Spain. The study concludes that these high frequency radio transmissions may neutralize protective cells in the skin that otherwise would combat and repair sun damage. [The full text of this study is available at: http://www.MedSciMonit.com/pub/vol_10/no_7/4321.pdf]

Other significant studies of the biologic effects of RF radiation that have been published while this case has been pending include a Korean report on leukemia, and a joint European study on DNA breaks. On January 11, 2005, the UK's National Radiological Protection Board headed by Sir William Stewart announced a comprehensive new report on mobile phones and base stations. (*See:* http://www.hpa.org.uk/radiation/publications/documents_of_nrpb/abstracts/absd15-5.htm). The Executive Summary of the report ends with a discussion of "Health-related research," and says:

> The Board particularly supports *the need for further research*, in the following areas:
>
> ***
>
> (c) effects of RF exposure on children,***
>
> (f) studies of RF effects on direct and established measures of human brain function and investigations of possible mechanisms involved, (1)
>
> (g) complementary dosimetry studies focused on ascertaining the exposure of people to RF fields.
>
> Executive Summary, par 89 (Emphasis added)

Members of the Federal Radiofrequency Interagency Work Group in the U.S., including representatives of EPA, FDA, NIOSH and OSHA, also have urged the FCC to review the human health impact of wireless RF radiation. (See letter

printed in the Joint Appendix in the Court of Appeals at A-22 – A-29). The Court of Appeals effectively dismissed this letter, saying it "didn't represent the official policy or position of member agencies."(A-16) The court's implication is that these career government employees were off on some frolic of their own. The official Charter under which they operate (adopted in July, 1995) takes a much different view of their role:

RF Inter-Agency Work Group
Charter

> The Radiofrequency (RF) Inter-Agency Work Group is established to provide a forum to address public health and regulatory issues pertaining to radiofrequency radiation, and provide a basis for coordination among member Agencies in their approach to RF issues. The Work Group will address the development of RF radiation exposure standards, guidance or guidelines for the general public, and specific devices. Both public health issues and interference issues are matters of concern. The Work Group will also provide a forum for discussion of specific RF radiation related activities and policies of the member Agencies which could affect other federal agencies represented in the Work Group. Recognizing the increasing use of RF technology, the Work Group will also provide a forum to discuss developing issues, and address the need for a more long range federal strategy. This will lead to a more coordinated federal approach to health issues associated with existing and proposed technology which use and produce exposure to RF radiation. Specific subcommittees will be established to carry out the work of the Inter-Agency Work Group.

> The RF Inter-Agency Work Group is composed of Federal agencies which have regulatory or public health responsibility to control the risk from the use and/or exposure to RF or have responsibility for regulation and management of the use of the RF radiation spectrum. This includes the Federal Communications Commission (FCC), National Telecommunications and Information Administration (NTIA), Food and Drug Administration (FDA), National Institute of Occupational Safety and Health (NIOSH), Occupational Safety and Health Administration (OSHA), and Environmental Protection Agency (EPA).

Rather than dismiss such sensible efforts at coordination and pooling of resources and experience between federal agencies, the courts should commend them and treat them with the same deference accorded to the individual agencies of which the members are composed.

The FCC has rejected all of these calls for further research into environmental health effects of RF radiation notwithstanding the overwhelming evidence from all over the world, as well as within this country, that such research is absolutely necessary to protect the public interest.

ARGUMENT

Reasons Relied on for Allowance of the Writ

1. THE DECISION OF THE COURT OF APPEALS BELOW DIRECTLY CONFLICTS WITH THE SECOND CIRCUIT'S LANDMARK DECISION IN SCENIC HUDSON ON THE AFFIRMATIVE DUTY OF A FEDERAL REGULATORY AGENCY TO INQUIRE INTO ALL RELEVANT FACTS, INCLUDING IMMEDIATE AND LONG-RANGE EFFECTS OF ITS ACTIONS, AND TO SUPPLEMENT THE RECORD WHERE NECESSARY

The District of Columbia Court of Appeals below rejected EMR's argument that a Federal agency charged with protecting the public interest has an affirmative duty to gather and consider all relevant facts. This principle of affirmative agency responsibility was decided in the landmark *Scenic Hudson* case in the Second Circuit in 1965, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 Fed.2d 608 (2nd Cir. 1965), *cert. denied* 384 U.S. 941 (1966). In that case, the Federal Power Commission limited itself in ruling on a controversial proposal to build a pumped storage plant inside Storm King Mountain in the Hudson Highlands by simply considering the technical feasibility and appropriateness of the project. On appeal the Circuit Court pointed out that Congress gave the FPC a broader responsibility.

> The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. (*Id.* at p. 620)

And again,

> The Commission must see to it that the record is complete. The Commission has *an affirmative duty*

to inquire into and consider all relevant facts. (*Ibid.*) (Emphasis added)

The *Scenic Hudson* Court quoted an ICC Commissioner's description of how a federal agency should perform its responsibilities:

> 'The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in ***. The agency must always act upon the record made, and *if that is not sufficient, it should see the record is supplemented before it acts.* It must always preserve the elements of fair play, *but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible.****' (*Id.* at p. 621) (Emphasis added.)

The DC Court of Appeals in this case has obviously forgotten this primary duty of a federal agency charged with the public interest to inform itself and not to act ignorantly. This Court should remind the FCC Commissioners that their oaths of office require them to carry out the law and not sit back and pick and choose whether they feel "inclined" to do so or not. As the *Scenic Hudson* Court correctly observed:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. *This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.* (Emphasis added.)

The FCC erred as a matter of law in asserting that it has no obligation to initiate the inquiry sought by the EMR petition. That result is compelled by the text of the 1996 Act and the absence of any statute assigning the duty of adopting emissions regulations to any other federal agency.

The Conflict Between the Circuits

The EMR petition to the FCC was a request that *the agency itself* conduct a factual inquiry into low-power non-thermal biologic effects of wireless RF transmissions. EMR did not ask the agency merely to evaluate existing studies, many of which were conducted by academics with limited resources in contrast to the resources available to the FCC and the other federal agencies on whom it can call for help. The studies submitted by EMR constituted the *prima facie* case for the FCC to initiate further studies into the biologic impact of its outdated regulations, not the final result of studies yet to be performed.

The FCC itself correctly understood the nature of EMR's petition from the outset:

> EMR had *requested that we initiate a proceeding to gather information and opinion about the need to revise our regulations* for radiofrequency ("RF") radiation and use the information so obtained to revisit our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. (A-1) (Emphasis added)

The Court of Appeals, however, mistakenly treated the EMR request as one to make changes in the FCC's regulations based solely upon the research examples EMR supplied to the agency:

> Thus we review the Commission's rejection of EMR's petition as we would agency rejection of any petition to initiate a rulemaking. (A-19)

This is the wrong standard. As 47 CFR Sec. 1.430 makes absolutely clear, proceedings seeking a Notice of Inquiry "do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register." EMR's Petition for Inquiry was not a request for rulemaking, and should not have been treated as such.

The Court of Appeals exacerbated its legal error by basing its denial of the petition for review entirely on the concededly limited research gathered by the citizen's group, weighing and evaluating that research alone in deciding that an inquiry by the FCC was not necessary. The Court missed the whole point of the proceeding before the FCC. More significantly, it also repudiated the affirmative duty of a federal agency itself to gather all relevant facts, as decided by the Second Circuit in *Scenic Hudson.*

This is what the Court below said:

> EMR's submissions implicitly raise one of the strongest potential bases for overturning an agency's refusal to initiate a rulemaking — that "a significant factual predicate of a prior decision on the subject has been removed." *WWHT*, 656 F.2d at 819; see also *American Horse*, 812 F.2d at 5; *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). EMR suggests that the studies it submitted (after the decision of the Office of Engineering & Technology) show that exposure to RF radiation is unsafe at levels too low to cause thermal effects. But the articles submitted are nothing if not tentative. One, for example, hypothesizes a mechanism by which cell phone radiation might promote cancer, but also notes that "[t]o date, there is limited scientific evidence of health issues, and no mechanism by which mobile phone radiation could influence cancer development." Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 Differentiation 93, 93 (2000). We find

> nothing in those studies so strongly evidencing risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting. (A-21)

The burden is not on the citizen's group *to provide the complete evidentiary record* for the FCC to decide whether to revise the FCC's outdated guidelines. That burden rests squarely on the FCC itself. The only burden the EMR voluntarily assumed was to show the FCC that there was a reasonable basis for the agency to initiate more comprehensive research on its own and, if necessary, to request the assistance of other qualified federal agencies to help conduct authoritative and reliable research.

The Public Interest Mandate

Congress explicitly has directed the Federal Communications Commission to encourage deployment of advanced telecommunications technology "in a manner consistent with the public interest."

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, *in a manner consistent with the public interest*, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (47 U.S.C. § 157 (a)) (Emphasis added.)

The obligation of the FCC to regulate *in the public interest* is especially relevant to its current headlong rush to authorize digital, high speed, broadband wireless transmissions,

particularly in regard to the potential health impact of such expanded wireless services on schoolchildren.

Impact on Schoolchildren

Congress directed the FCC to focus "in particular" on the wireless transmission of advanced telecommunications to "elementary and secondary schools and classrooms." The "public interest" of students, parents and teachers plainly is not limited to technological advancement.

In EMR's Reply Brief below we called the Court of Appeals' attention to the FCC's currently pending plans to expand wireless transmissions to "broadband services" and the agency's emphasis on transmitting these higher frequency radio signals *into schools* (See FCC 99-5). EMR pointed out that:

> *The FCC has never reviewed, questioned or altered its obsolete 1985 Radiofrequency Radiation Guidelines based on the potential environmental impact of the new advanced broadband communications services on students at elementary and secondary schools.* The FCC's order of August 14, 2003, which is the subject of this appeal, has now closed the door to any FCC-initiated research to determine whether guideline changes are required *to protect schoolchildren from harm caused by broadband RF radiation.*
>
> (EMR Reply Brief pp. 4-5) (Emphasis added.)

The FCC's ongoing expansion of high frequency broadband wireless services even while the appeal in this case was pending before the Court of Appeals plainly should not have been allowed to proceed until the agency initiated an adequate fact-finding study of the potential public health effects on innocent bystanders — especially school children, the primary target of the FCC's broadband initiative. Children, as the British NRPB has recognized (*supra*), are biologically

different from adults and the same exposure standards for adults do not apply to them. Children's skulls, for instance, are thinner and absorb radiation more efficiently with deeper RF penetration. They will also be around longer than adults to accumulate long-term effects from years of additional exposure.

The concerns of parents of elementary school children over potential long-term harm to their children from wireless RF radiation is dramatically articulated by a recent statement by the spokesperson for parents at PS 122 in New York City [available at http://www.emrpolicy.org/public_policy/schools/gonzalez_11jan05.pdf].

Such parental concerns are not limited to the United States. In Greece recently, some 500 schoolchildren on the island of Lesvos refused to attend classes because of the presence of a camouflaged mobile telephone mast. Local authorities revoked the telephone operating license in March. (Reported in *Kathimerini* newspaper (English Edition) Friday, March 18, 2005 (Athens)) This remedy is not available to school students or their parents in this country because the FCC has absolute and total control over the licensing of cell towers that meet its 1985 guidelines.

UK's "Precautionary Approach"

The NRPB (Stewart) reports issued in 2000 and 2004 (see: http://www.hpa.org.uk/radiation/publications/documents_of_nrpb/abstracts/absd15-5.htm) both urged a "precautionary approach" in avoiding the exposure of small children to RF radiation — a "public interest" concern the FCC has totally failed to address or consider while it has been tossing all such caution to the winds.

2. THE PRE-EMPTIVE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION OVER STATE AND LOCAL GOVERNMENTS TO SET HUMAN EXPOSURE GUIDELINES OBLIGATES THE FCC TO REVIEW AND UPDATE THOSE GUIDELINES REGULARLY

The heart of the FCC Order below is the following statement in the opening paragraph on page 1 of the Order:

> EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our regulation for radiofrequency ("RF") radiation and use the information so obtained to revise our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that *this Commission is not the most appropriate forum* to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time. (Emphasis added.)(A-1 – A-2)

The Commissioners may not wish to be the "most appropriate" forum to initiate an inquiry, but they do not have a choice in the matter. Congress did not give them the luxury to pick and choose what they want to do. They are public officials with a clear public responsibility. Their refusal to act was a plain dereliction of duty.

The Telecommunications Act of 1996 — passed following intensive lobbying and lavish campaign contributions to Members of Congress of both parties — blocked all local environmental opposition to the siting of cell transmitters in communities across the United States by giving the FCC *total and absolute preemptive control over the question of environmental harm*. The impact of that legislation, and the

FCC's response, was summarized succinctly by the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, at 88 (2nd Cir. 2000):

> While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act"), several provisions of which affected the FCC's ongoing proceedings. In particular, *the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation* where the facilities would operate within levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)((B)(iv). In the Second Order that is at issue in this case, the FCC announced, *inter alia*, a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions. (Emphasis added)

The Second Circuit emphasized the significance of the Telecommunications Act of 1996 at page 95-96:

> IV. The FCC's Preemption of Certain State Regulation
>
> As noted earlier, while the rule-making process was underway, Congress passed the Telecommunications Act of 1996, providing, *inter alia*, that
>
> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

> *The FCC, as part of its rulemaking, issued a comparable interpretive ruling preempting state and local governments* from regulating, based on RF emissions, the operation of personal wireless service facilities that are in compliance with the FCC regulations concerning such emissions. (Emphasis added)

The Second Circuit rejected the petitioners' argument there that under the Telecommunications Act of 1996 state and local governments could still regulate the "operation" of cell transmission towers (at p. 96):

> Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.

The Commission's regulations governing radio frequency emissions therefore *totally block* any and all citizen and governmental challenges to the installation of transmission facilities based on environmental harm. The hands of town, city and state officials are completely tied on the question of potential harmful environmental effects because of this absolute vesting of power and authority in the FCC.

Although the Commissioners and FCC staff may feel inadequate to perform this responsibility, they have no choice in the matter. It is their duty to inform themselves. The law of the land requires that they issue and maintain regulations governing radiofrequency emissions to guard the human health of every citizen in the nation. It is a duty that cannot be blithely brushed aside. The FCC is charged by law with protecting the public from environmental harm caused by RF emissions.

The Commission has totally abandoned that responsibility in this proceeding. Its members must therefore be directed by the reviewing Court to initiate an inquiry into the environmental effects of its existing and proposed regulations without further delay.

3. THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) IMPOSES A "CONTINUING RESPONSIBILITY" ON THE FCC TO USE ALL PRACTICABLE MEANS TO ASSURE SAFE AND HEALTHFUL SURROUNDINGS FOR ALL AMERICANS

The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment. The Act declares it a national policy to "encourage productive and enjoyable harmony between man and the environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources important to the Nation" (42 U.S.C. § 4321). The Act specifically declares a "*continuing policy of the Federal Government*, in cooperation with State and local governments, and other public and private organizations *to use all practicable means and measures* . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans" (42 U.S.C. § 4331).

NEPA also states that it is *the continuing responsibility of the Federal Government to use all practicable means,* consistent with other essential considerations of National policy, to improve and coordinate Federal plans, functions, programs, and resources to, among other things: *assure safe, healthful*, productive and esthetically and culturally pleasing *surroundings for all Americans*; attain the widest beneficial

use of the environment without degradation, or risk to health or safety; preserve important historic, cultural and natural aspects of our national heritage; achieve balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and, enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources (42 U.S.C. § 4331).

The Act directs "that, to *the fullest extent possible*, the policies, *regulations and public laws* of the United States *shall be interpreted and administered in accordance with the policies of the Act*", and imposes general and specific requirements on all Federal agencies (42 U.S.C. § 4332).

Agencies are required to "utilize a systematic, *interdisciplinary approach* which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making. . .". They are also to insure that "*unquantified environmental* amenities and *values may be given appropriate consideration in decision making along with economic and technical considerations*"(42 U.S.C. § 4332 (2)(A)) (Emphasis added in all cases.)

The FCC concedes that it is not exempt from NEPA. It has the same "continuing responsibility" as other agencies to review and upgrade policies — in this case its RF Radiation Guidelines — to meet current conditions. This is an affirmative ongoing responsibility. The FCC may not stick its head in the sand and pretend that nothing is happening that brings its Guidelines into question.

The Second Circuit in its recent decision rejecting a direct substantive challenge to the FCC's Guidelines squarely addressed the applicability of NEPA to the FCC. It concluded that the FCC properly considered the environmental impact

of its rulemaking *at the time the Guidelines were originally adopted. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95 (2nd Cir. 2000).

However, the issue presented here is a different one. The FCC's basic guidelines were adopted in 1985, with certain limited revisions in 1996-7. The scientific data on which the Guidelines were based, and on which the FCC made its original determination of environmental impact, pre-dated 1982 when the proposed Guidelines were first published. The research related solely to the *thermal* effects of acute exposure to various RF power levels — the functional equivalent of microwave ovens — *and never addressed the question of extended exposure to low-power RF emissions.*

The question in this proceeding is whether the "continuing responsibility" imposed by NEPA requires the FCC to initiate a new environmental inquiry based on recent and ongoing scientific studies — and initiate new studies — in light of all that has happened since 1982.

The Court of Appeals cited the Supreme Court's 2004 decision in *Norton* as the basis for rejecting any continuing FCC obligation under NEPA:

> EMR accordingly focuses on agencies' NEPA duties when new evidence turns up after completion of an EIS (or equivalent), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). *Marsh* considered a claim that the Corps of Engineers had neglected its NEPA duties when, one third of the way through construction of a dam, it received information arguably suggesting that the dam would cause more severe environmental harm than had been supposed at the time the EIS had been completed and construction approved. Regulations require an agency to prepare a Supplemental Environmental Impact Statement when "[t]here are significant new circumstances or information

relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), and the parties agreed that agencies were required to take a "hard look" at evidence suggesting that this standard had been met. *Marsh*, 490 U.S. at 370-74. The Court rejected plaintiffs' view that a reviewing court should examine the evidence afresh, ruling instead that the usual "arbitrary and capricious" standard should apply. *Id.* at 375-78. EMR suggests that the current circumstances are a "fair parallel" to those in *Marsh*. Petitioner's Br. at 36.

The FCC argues strenuously that it satisfied the "hard look" requirement, but we need not resolve that issue. In *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004), the Court declined to apply *Marsh* were the federal action in question was approval of a land use plan. Unlike the dam in *Marsh*, that "action" was complete when the new information was received. *Id.*, at 2384-85. Presumably later actions pursuant to the plan might be significant enough to require NEPA filings, just as some FCC actions relating to RF radiation will need new environmental studies — including, for example, the circumstances where the current regulations call for such studies. *But the regulations having been adopted, there is at the moment no "ongoing" federal action, id.* at 2385, *and no duty to supplement the agency's prior environmental inquiries.*

(A-18 – A-19.) (Emphasis added.)

The Court of Appeals was gravely mistaken.

The "Ongoing" Federal Action

The Court of Appeals' major factual error was its statement that "there is at the moment no 'ongoing' federal action." (A-19) The Court plainly overlooked the facts publicly available from the FCC and expressly provided in EMR's Main Brief on *the FCC's continuing strategic goal and plans* to expand radio frequencies for wireless Broadband services:

> The FCC's strategic goal for Broadband is *to establish regulatory policies that promote competition, innovation, and investment in Broadband services and facilities* while monitoring progress toward the deployment of broadband services in the United States and abroad.
>
> (Quoted at Brief page 46) (Emphasis added.)

Most significantly, the Court of Appeals overlooked the *proposed new regulations* publicly announced by the FCC just before oral argument (explicitly called to the Court's attention in the "Recent Developments" document dated September 27, 2004 handed up to the Court during the oral argument itself). That official press release clearly described the FCC's *ongoing federal action*:

> September 9, 2004:
>
> Washington, DC — *The Federal Communications Commission today provided an additional twenty megahertz of spectrum that can be used to offer a variety of broadband and advanced wireless services (AWS),* potentially including "third generation" (3G) wireless services. The Commission allocated and paired five-megahertz blocks of spectrum at 1915-1920 MHz with 1995-2000 MHz, and 2020-2025 MHz with 2175-2180 MHz for AWS use. *This will benefit the public by fostering the development of new wireless services* that

> will provide American consumers with additional communications options and capabilities. (Emphasis added.)

A copy of the FCC Press Release of September 9, 2004 was attached to petitioner's Reply Brief in the Court of Appeals and was headed:

FCC DESIGNATES SPECTRUM FOR ADVANCED WIRELESS SERVICES AND PROPOSES LICENSING AND SERVICE RULES

This *ongoing federal action* plainly required the FCC to examine the environmental impact of the "new wireless services."

CONCLUSION

The Court should grant certiorari to review the arbitrary and capricious action of the Federal Communications Commission in refusing to initiate up-to-date accurate scientific research into the biologic health effects on innocent bystanders, particularly schoolchildren, from continuous low-power RF radiation produced by the rapidly expanding ultra-high frequency wireless services the agency is actively authorizing and encouraging.

Respectfully submitted,

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